IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-249

LARRY STEVEN JOHANSEN,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondents.

PETITION FOR
WRIT OF CERTIORARI
TO THE APPELLATE DEPARTMENT OF THE
SUPERIOR COURT OF THE STATE OF CALIFORNIA,
COUNTY OF LOS ANGELES

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TOPICAL INDEX

TABLE OF AUTHORITIES

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Petitioner Larry Steven Johansen respectfully prays that a Writ of Certiorari be issued to review the final judgment of the Superior Court of the State of California entered in the above matter on April 18, 1977.

OPINION BELOW

The written decision of the California Superior Court, Appellate Department, for the County of Los Angeles is set forth in Appendix "A". Said decision was not reported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3) with respect to the final judgment of the Appellate Department of the Superior Court of California in People v. Johansen, No. CR A 14575. The Decision and Opinion of the Appellate Department was filed on April 18, 1977, and a Petition for Rehearing and/or Certification was denied on May 18, 1977. A copy of the Order Denying Rehearing and/or Certification is set forth in Appendix "B".

QUESTIONS PRESENTED

1. Is a jury competent to rule on community standards in an obscenity case in the absence of objective evidence as to such standards where the relevant community is the State of California?
2. May a state deprive an individual of his Sixth Amendment right to a fair trial where there is uncontroverted evidence of misconduct on the part of the jurors?
3. May a search warrant for the seizure of allegedly obscene film be executed when the law does not require the prosecution to initiate a hearing on the issue of obscenity wherein the prosecution has the burden of proof and where no such hearing was held?

CONSTITUTIONAL PROVISIONS

AMENDMENT I

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peacefully assemble, and to petition the Government for a redress of grievances."

AMENDMENT VI

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses against him; to have compulsory process for obtaining witnesses in his favor and to have the assistance of counsel for his defense."

STATEMENT OF THE CASE

Pursuant to a search warrant dated December 9, 1975, signed by the Honorable Herbert J. Adden, Judge, Los Angeles County Sheriff's Deputies seized two reels of allegedly obscene films and the projectors upon which these films were shown.

On or about December 10, 1975, a complaint was filed in the Whittier Municipal Court of the State of California, charging the petitioner herein with exhibition of obscene matter in violation of California Penal Code § 311.2.

On or about January 21, 1976 a motion was heard by the Honorable Herbert J. Adden, Judge, requesting that; the evidence of the films and projectors be suppressed; that the films and projectors be returned, for an adversary hearing on the issue of obscenity of the films at which the People would have had the burden of proof on the issue of obscenity, and for the return of the films if that burden were not met.

Following oral argument, the court ruled that it could only determine whether there was probable cause to believe the films were obscene. The court viewed the films, and after hearing further argument, denied the motion to suppress and ordered only the projectors returned to appellants.

After pre-trial motions the matter came up for trial on January 29, 1976, the Honorable Alfonso Hermo, Judge, presiding.

Jury selection commenced and the court appointed a reporter at county expense. The parties stipulated that the reporter need not be present during voir dire of prospective jurors. During the

voir dire both the prosecution and the defense questioned the jurors at length on their exposure to sexually explicit materials. Upon motion of the People, the court read the definition of obscenity to the prospective jurors. All of the jurors who were selected stated under oath that they would be able to set aside their personal feelings or opinions on the films to be shown, and base their verdict solely on the basis of the evidence presented in the courtroom and the instructions of the court.

On January 30, 1976, selection of the 12 regular jurors was completed.

On February 3, 1976, selection of three alternate jurors commenced in the presence of the reporter. All trial proceedings relating to the taking of the evidence and the taking of the verdict were reported.

At the trial, the prosecution presented Deputy Sheriff Kenealy as their sole witness to testify as to community standards and the other tests of obscenity under California law. Deputy Kenealy testified that he had impressionistically

reviewed information from various sources including an introductory course in psychology at a community college (R.T. p. 358), his practical training as a deputy sheriff (R.T. p. 340), and evidence he has heard at trials (R.T. p. 341), although he has not engaged in a systematic review of the information (R.T. p. 341). He had not engaged in any scientific psychological experiments relating to pornography with the exception of a 1973 survey (R.T. p. 342). He testified that the 1973 survey was the only "scientific" procedural study he had conducted (R.T. p. 350).

The 1973 survey was a "mail-back" type. The surveys were distributed to citizens in every county in the state (R.T. p. 395), but no record was kept of which counties the returned questionnaires came from (R.T. p. 397). Deputy Kenealy admitted that if no questionnaires were returned from San Francisco, Los Angeles or San Diego counties, this fact would have an enormous effect on the results (R.T. p. 407).

Mr. Brad Sanders, a defense witness, made a count of the envelopes and found only a fraction of the expected response from Los Angeles County, and no response from San Francisco (R.T. pp. 495, 501).

Deputy Kenealy testified that the purpose of gathering information on age, sex, racial group, occupation, etc., was to determine whether the sample was representative of the community (R.T. p. 390). He said that there are four racial groups into which the population is divided, but that he did not know the percentages of these groups (R.T. p. 401), and that data as to occupation was not tabulated (R.T. p. 401).

Deputy Kenealy admitted that community standards of candor might recognize a distinction between what could be shown to an audience of consenting adults (R.T. pp. 450, 451).

Deputy Kenealy further testified that although there was some question as to the meaning of the phrases used within the questionnaire, and those uncertainties were expressed by those responding, their responses were included in the

survey (R.T. p. 413). 2.2 percent of the respondents understood none, or only some of the questions presented, 9.6 percent understood most but not all of the questions. However, all of the responses of those persons were included within the survey results.

Mr. Brad Sanders testified that he had compiled demographic material from sources including the 1970 U.S. Census, and made a comparison of statistical information and the responses upon which the sheriff's survey relied.[1/] (A copy of the comparison is included in Appendix "C")

The following partial statistics are included at this point for the court's convenience:

1/ 1970 United States Census: 1973 California Statistical Abstract; and County and City Data Book, 1972, A Statistical Abstract Supplement. (U.S. Department of Commerce)

CALIFORNIA POPULATION

	California Statistics	Sheriff's Survey
Distribution By Race		
White	73.5	84.7
Black	7.0	7.3
Spanish or Spanish Surname	15.5	6.5
Other	4.0	1.2
	100.0	99.7
Distribution By Marital Status		
Single	25.1	18.3
Married	60.4	66.9
Separated	1.4	-
Widowed	6.8	4.9
Divorced	5.5	8.2
	98.2	98.3

Distribution By Years of School Completed (25 years old and over)		
Less than 6 years	4.3	.4
7-11 years	29.0	8.7
12 years (High School Graduate)	32.8	36.8
13-14 years (2 years College)	-	30.5
13-15 years (1-3 years College)	16.4	-
16 years (College Graduate)	13.4	19.3
	95.9	95.7

Dr. Levine, a Professor of Survey Research at the University of California, Los Angeles, testified for the defense that a "Mail back" survey is inherently inaccurate in determining public opinion. Dr. Levine pointed out, that of the 5,000 questionnaires distributed, only about 1,500 were returned, and no data was gathered on the 3,500 individuals who failed to respond (R.T. p. 547).

Dr. Levine testified that only one of the identifying groups matched the population data (that group being the male-female breakdown). The basis of sampling

and public opinion polling is that the people interviewed represent the population (R.T. p. 529). Dr. Levine viewed the sheriff's survey as "worthless", pointing out that there were too many "better educated" and not enough minority responses for the sheriff's survey to be representative (R.T. p. 547).

Dr. Levine testified that the responses themselves were not reliable because there was no Spanish version of the questionnaire, there was no black interviewer in black areas, there was no way to compute sampling error (R.T. p. 547).

Dr. Levine testified that a standard procedure for this type of sampling is a "pre-test" so that the questionnaires might be exposed to the public so that problems that might arise later can be corrected (R.T. p. 574). Dr. Levine testified that this procedure was not undertaken.

Dr. Levine testified that the results of the sheriff's survey were not edited (R.T. p. 548). That although many of those people responding to the

questionnaires answered that they did not understand the questions, the inconsistencies in their responses were so great that those responses should not have been tabulated into the sheriff's results (R.T. p. 548).

The court gave the following instruction:

> "When the matter alleged as obscene in the complaint is received in evidence by the court, and from your examination of this matter, you find that it is so patently offensive as to violate any conceivable state-wide community standard, expert affirmative testimony that the matter, taken as a whole, substantially exceeds state-wide standards community standards is not required; and expert testimony on this issue need not be introduced by the People."

On March 8, 1976, the matter came on for sentencing. No court reporter was present. Appellant's counsel requested a conference in chambers whereupon he handed to the Judge a typewritten letter which counsel had received from one of the jurors, Milton E. Burgey.

The letter from Juror Burgey described the conduct of the other jurors, including conversations among the jurors both inside and outside the jury room. The letter refers also to conversations about media information discussed by the jurors that they were specifically admonished to avoid. The Judge read the letter and then handed it to the prosecutor who had not previously seen it. The letter was not offered as an exhibit but merely presented to the court by defense counsel in support of an unnoticed motion for a new trial and a request that the court release the addresses and phone numbers of the other jurors. The People objected to the letter as hearsay and as being an improper method of attempting to impeach the verdict, and announced unwillingness to waive notice. After a lengthy discussion, the motion of the defense for a continuance was granted so that a formal motion for new trial could be presented, so that the defense could either subpena Juror Burgey or obtain his affidavit and so that the prosecution could also interview him. The court denied appellant's request for release of the addresses and phone

numbers of the other jurors. The hearing on the motion was scheduled for March 22, 1976 and both appellants waived time.

On March 22, 1976 appellants filed and served a formal motion for new trial based on a declaration of Juror Burgey. The prosecution objected to the declaration and requested that any motion for new trial be based on competent evidence. The prosecutor also informed the court and defense counsel that Sheriff's Investigator Raffa had interviewed Juror Burgey and obtained statements which allegedly contradicted both Mr. Burgey's letter and declaration and that Raffa was available to testify. Defense counsel stated that Mr. Burgey would testify if required, but was not present in court. After a lengthy discussion the parties agreed that the court could read and consider the Burgey declaration and a copy of Deputy Raffa's report (copies thereof are attached at Appendix "D"). After doing so, the Judge announced that he determined Mr. Burgey had apparently had "second thoughts" about his verdict; however, that was not a sufficient basis in

law or fact to set aside the verdicts. The Judge also found no sufficient showing of jury misconduct to justify setting aside the verdicts or granting a new trial.

The matter was then called in open court. The motion for new trial was submitted without further argument; the court denied the motion on the grounds that there was no showing of jury misconduct and that a juror's second thoughts are not grounds for a new trial.

REASONS RELIED UPON IN SUPPORT OF THE PETITION

I

THERE WAS INSUFFICIENT EVIDENCE OF THE STANDARDS OF THE STATE OF CALIFORNIA WITH RESPECT TO THE EXHIBITION OF SEXUALLY EXPLICIT FILMS TO AN AUDIENCE OF CONSENTING ADULTS

Although Deputy Kenealy claimed to have an impressionistic understanding of community standards, the only study he had undertaken which he claimed to be objective was the 1973 survey of public opinion, which he believed accurately reflected statewide community standards.

The records show, however, that the survey results are wholly unreliable.

The survey was the mail-back type, and questionnaires were distributed in every county throughout the state. There was no record kept, however, of where those questionnaires were returned from.

The sample taken by the deputy sheriffs failed to comply with the most basic rules for survey research, the guidelines that have been established to insure that the results are fairly representative of the community from which they were taken.

Of the 5,000 questionnaires distributed, only 1,500 were returned and tabulated. No data was kept on the other 3,500 people to whom the questionnaires were distributed. Of those questionnaires that were returned, they were not computed by the county from which they had come.

Deputy Kenealy admitted that those percentages might affect the validity of his survey, and that if the returns from certain counties were a smaller percentage than they should be, that this fact might have an enormous effect.

The questions were not pretested, to determine whether they were understandable, and whether they elicited meaningful responses. The results were not edited to exclude random responses, or even responses from people who admit that they did not understand the question to which they were responding.

Dr. Levine testified that all of these procedures were elementary in attempting to measure public opinion, and that the failure to obtain a representative sample was fatal.

The uncontradicted numerical evidence clearly showed that the sample obtained by the sheriffs was not representative.

Other than the 1973 survey, the prosecution presented no objective evidence of community standards.

The Judge gave the following instruction:

> "When the matter alleged as obscene in the complaint is received in evidence by the court, and from your examination of this matter, you find that it is so patently offensive as to violate any conceivable state-wide community

> standard, expert affirmative testimony that the matter, taken as a whole, substantially exceeds state-wide standards community standards is not required; and expert testimony on this issue need not be introduced by the People."

The instruction, as given by the court, permits the jury to ignore expert testimony as to community standards, and to convict on the basis of its own opinions even if it finds that the prosecution's evidence was unsatisfactory.

The problem posed herein has been addressed by Justice Stevens in his dissenting opinion in Smith v. United States (1977) 97 S.Ct. 1756:

> "The question of offensiveness to community standards, whether national or local, is not one that the average juror can be expected to answer with even-handed consistency."

Justice Stevens also describes the futility of attempting to define or describe obscenity as a whole, let alone attempting to define some "standards" within communities that will meaningfully delimit acceptable as opposed to

unacceptable material.

When a state has adopted state-wide standards rather than local community standards as the test of obscenity (as California has), the jury cannot be deemed to embody the community, and competent and objective evidence of state-wide standards must be offered by the prosecution.

Although the federal courts adhere to a more relaxed test of community standards, a jury determination is nonetheless subject to the court's power to conduct independent review of the constitutional claims. Jenkins v. Georgia (1974) 418 U.S. 153, 94 S.Ct. 2750.

California applies state-wide standards and evidence of such standards is normally required.

> ". . .[S]ince we designate the State of California as the relevant 'community' for this case, we cannot realistically expect the trier of fact to understand intuitively how the community as a whole would react to allegedly obscene material. In re Gianinni (1968) 69 Cal.2d 263 72 Cal.Rptr. 655-664."

Moreover, weighing the evidence of community standards is equally a part of appellate review:

> "An appellate court must reach an independent decision as to the obscenity of the material. (Citation) Since an appellate court certainly does not in any sense compose a cross-section of the community, it cannot effectively carry out this function in the absence of evidence in the record directed toward proof of the community standard." In re Gianinni, supra, 72 Cal.Rptr. at 664.

The evidence produced by the prosecution fails to provide any objective basis upon which the jury might base its determination as to community standards (see discussion, infra), and hence the petitioner is entitled to a reversal of his conviction.

II

MISCONDUCT ON THE PART OF THE JURORS DEPRIVED PETITIONER OF HIS RIGHT TO A FAIR TRIAL

Although California law states that a juror is not a competent witness to impeach his own verdict, except in a case

of resort to chance, the law is well settled that the jurors' incompetency may be waived, and must be held to have been waived, by failure to object. People v. Evans, 63 Cal.App. 777, 220 Pac. 309; People v. Curtis, 255 Cal.App.2d 378, 63 Cal.Rptr. 138. Moreover, objective facts disclosed in a juror's affidavit may be used to impeach a verdict. People v. Hutchinson (1969) 71 Cal.3d 342.

The declaration of Juror Milton E. Burgey (appearing in Appendix "D") was entered into evidence without objection and thus competent evidence of misconduct by the jury is part of the record, and is uncontradicted. (People v. Brown [1976] 61 Cal.App.3d 476, 132 Cal.Rptr. 217.)

On the first page of Mr. Burgey's typed declaration he states that two of the women jurors expressed the view that the defendants were guilty before deliberations had begun and indeed before all the evidence had been heard. It is clear that pre-judgment of a case is serious misconduct. People v. Brown, supra (1976) 61 Cal.App.3d 476, 132 Cal.Rptr. 217; Clemens v. Regents of the University

of California, 20 Cal.App.3d 356, 97 Cal. Rptr. 589.

The jury failed to obey the court's instruction to refrain from discussing the case until all the evidence was heard and the instructions were given. The second page of Mr. Burgey's declaration states:

> ". . . up until the time we started deliberating there was constant comments about the case by the jurors. They would talk about the films being obscene. They would also state that they were 'shocked.'"

Juror Burgey describes the woman sitting next to him in the jury box and states:

> "When the films were shown she would constantly make remarks about how disgusting they were, and make gutteral sounds about the films when they were shown. I also heard her discuss that the films were nauseating and sick in the halls, to other jurors before we started deliberating."

The third page of Juror Burgey's declaration reports the jurors discussing material related to the case and a much publicized sex perversion case being tried

concurrently. It continues:

> "I recall that the jurors would constantly discuss the cases with me. It got so to the point that I would take the steps in the courthouse, rather than the elevators, because I would not want to discuss the case, since the judge told us not to."

The court in Kritzer v. Citron, 101 Cal.App.2d 33, 223 P.2d 808 stated emphatically that:

> "It is well established throughout the states of this union and in the federal courts that it is misconduct for a juror during the trial to discuss the matter under investigation outside the court or to receive any information on the subject of the litigation except in open court and in the manner provided by law. Such misconduct unless shown by the prevailing party to have been harmless will invalidate the verdict."

Members of the jury failed to obey the court's specific instruction given before they went out to deliberate, to avoid reading an article relating to pornography that appeared in the Los Angeles Times that day. At least one juror, Mr. Duffy, read the article according to

Juror Burgey's declaration. Mr. Duffy's explanation for so doing was that ". . . he couldn't resist it, his curiosity got the best of him." He said that he "read the whole article and it was a duzey," and that it was against obscenity.

The judge specifically forbade the reading of that particular article but Juror Duffy deliberately sought it out and read it. Since community standards was a hotly contested issue at the trial, his reading of an article that was against obscenity was clearly prejudicial. People v. Lessard (1962) 58 Cal.2d 447, 25 Cal.Rptr. 78; People v. Woung Long (1921) 159 Cal. 520, 114 Pac. 829.

Throughout his declaration Juror Burgey relates how he was badgered and chastised by the jurors including the jury foreman, Mr. Irving. The jurors called Mr. Burgey "stupid" on at least two occasions when he expressed his desire to be heard by all the jurors on the issues of law confronting them.

On the bottom of the fourth page of Juror Burgey's declaration he says:

"I was harrassed so much and my views were stifled so badly, that on several occasions I considered going to the judge to take me off because I couldn't work with the jury."

Evidence of angry chastisement by a jury foreman is admissible to show misconduct. People v. Orchard (1971) 17 Cal. App.3d 568, 95 Cal.Rptr. 66.

This type of oppressive behavior present in the jury room prevented the free exchange of ideas and forced a jury to vote with the majority out of fear of subjection is different in character from that behavior described in the Orchard case, and effectively deprived the petitioner of his Sixth Amendment right to a fair trial.

In Turner v. Louisiana (1965) 379 U.S. 466, 471, 85 S.Ct. 546, this Court held that "a fair trial by a panel of impartial 'indifferent' jurors" is a fundamental due process right. The court went on to observe:

"The requirement that a jury's verdict 'must be based upon the evidence developed at the trial' goes to the fundamental integrity

of all that is embraced in the constitutional concept of trial by jury.' . . . Exercise of calm and informed judgment by its members is essential to proper enforcement of law."

. . .

"In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand where there is full judicial protection of the defendant's right of cross-examination and of counsel." Turner v. Louisiana, supra, 397 U.S. at 472-473.

In the instant case, the objective evidence of jury misconduct shows consideration of outside information in violation of the court's express admonition, an absence of fair or impartial judgment, and a refusal to hear all the evidence before deciding the case petitioner is entitled to a new trial before an impartial jury.

III

PETITIONER WAS ENTITLED TO A HEARING ON THE ISSUE OF OBSCENITY, WHEREIN THE PROSECUTION HAD THE BURDEN OF PROOF

The two recent cases pertaining to the search and seizure of allegedly obscene materials are Heller v. New York, 413 U.S. 483, 93 S.Ct. 2789 and Roaden v. Kentucky, 413 U.S. 496, 93 S.Ct. 2796, both decided June 25, 1973. In Roaden, the court held that, absent exigent circumstances, allegedly obscene films being exhibited in a theatre could not be seized except by a search warrant issued under a procedure which is designed to focus searchingly on the question of obscenity. The court said:

> "Seizing a film, then being exhibited to the general public, presents essentially the same restraint on expression as the seizure of all the books in a bookstore. Such precipitous action by a police officer, without the authority of a constitutionally sufficient warrant, is plainly a form of prior restraint and is, in those circumstances, unreasonable under Fourth Amendment standards. The seizure is unreasonable, not simply because

> it would have been easy to secure warrant, but rather because prior restraint of the right of expression, whether by books or films, calls for a high hurdle in the evaluation of reasonableness. The setting of the bookstore or the commercial theatre, each presumptively under the protection of the First Amendment, invokes such Fourth Amendment warrant requirements because we examine what is 'unreasonable' in the light of the values of freedom of expression." Roaden v. Kentucky, 93 S.Ct. at p. 2801.

In the companion case of Heller v. New York, 93 S.Ct. 2789, the court held that a prior adversary hearing was not required as condition for the issuance of a warrant for the seizure of an allegedly obscene commercial film, but did impose substantive requirements for adversary hearings following seizure by warrant which do not exist in California law. In Heller the judge had gone to the theatre and reviewed the film himself. Based upon his viewing, he immediately issued warrants for the seizure of the films based upon his determination that the films were in fact obscene. In the following passage, the court imposed

post-warrant hearing requirements as follows:

> "But seizing films to destroy them or to block their distribution or exhibition is a very different matter from seizing a single copy of a film for the bonafide purpose of preserving it as evidence in a criminal proceeding, particularly where, as here, there is no showing or pre-trial claim that the seizure of the copy prevented continuing exhibition of the film. If such a seizure is pursuant to a warrant, issued after a determination of probable cause by a neutral magistrate, and, following seizure, a prompt judicial determination of the obscenity issue in an adversary proceeding is available at the request of any interested party, the seizure is constitutionally permissible. In addition, on a showing to the trial court that other copies of the film are not available to the exhibitor, the court should permit the seized film to be copied so that showing can be continued pending a judicial determination of the obscenity issue in an adversary proceeding. Otherwise, the film must be returned." 93 S.Ct. at pp. 2794-2795 (footnotes omitted) (emphasis added)

Sections 1525 through 1528 of the California Penal Code, which deal with

the requirements for issuance of a search warrant, do not follow the substantive requirements of Heller in that they do not provide for a prompt judicial determination of the obscenity issue in an adversary proceeding. Section 1538.5 of the California Penal Code which sets forth the procedural ground rules for attacks on illegal searches and seizures generally does not fill this void. The authoritative construction of § 1538.5 insofar as seizure of allegedly obscene films is concerned is contained in Monica Theatre v. Municipal Court, 9 Cal.App.3d 1, 88 Cal.Rptr. 71 (1970) hearing denied. The opinion in that case clearly establishes that the post-warrant adversary held under § 1538.5 is concerned only with the existence of probable cause and not with the issue of whether or not the film is obscene as required by Heller. For example, at 9 Cal.App.3d p. 9, 88 Cal. Rptr. p. 76, the court states:

> "This part of Section 1538.5 seems to contemplate a full hearing on the question of the lack of probable cause for the issuance of a seizure warrant for reasons of free speech violations, where

> the movant is a defendant and the material involved is intended to be used as evidence in a criminal trial."

Throughout the remainder of the opinion, the § 1538.5 adversary hearing is referred to as a "probable cause hearing." Procedure under California law also differs from that required in Heller in that the prosecution does not bear the burden of establishing the obscenity of the film. In California the defendant is the moving party bearing the burden of proof and must show that the films are:

> ". . . so clearly not obscene that there was no room for a determination by the magistrate that they were probably obscene." Monica Theatre v. Municipal Court, supra, 9 Cal.App.3d at p. 10, 88 Cal.Rptr. at p. 77.

More recently the California Court of Appeal has reaffirmed the rule that in California a defendant is only entitled to a probable cause issue on the question of obscenity. People v. Superior Court (Loar) 28 Cal.App.3d 600, 104 Cal.Rptr. 876 (1972). However, Loar was decided before Roaden and Heller.

Thus, so long as California does not go beyond allowing a probable cause hearing, its procedures are constitutionally deficient.

CONCLUSION

For the reasons stated herein, a Writ of Certiorari should issue.

Respectfully submitted,

KENNETH P. SCHOLTZ

JEFFREY S. COHEN

Attorneys for Petitioner

APPENDIX "A"

APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

FILED
APR 18 1977
County Clerk
By B. R. Seale, Deputy

PEOPLE OF THE STATE OF CALIFORNIA)
Plaintiff and Respondent,)
vs.)
LARRY STEVEN JOHANSEN and)
MARGARET SARA WRIGHT,)
Defendants and Appellants.)

Superior Court No. CR A 14575
Municipal Court of the
Whittier Judicial District
No. M 106977

OPINION AND JUDGMENT

Appeal by defendants from judgment of the Municipal Court.

Alfonso D. Hermo, Judge.

Judgment vacated as to Johansen; reversed as to Wright.

For Appellant - Kenneth P. Scholtz

For Respondent - John K. Van De Kamp, District Attorney by Harry B. Sondheim, Head, Appellate Division
Dirk L. Hudson, Deputy District Attorney

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We have carefully considered each of the arguments raised by appellant Johansen and, with one exception, find them to be without merit. The exception is that the trial court improperly sentenced Johansen on each count in violation of Penal Code section 654. On remand the court will impose a sentence to be executed on Count 1 only (no more severe than that previously imposed on account of any one single count). Any sentences or additional counts are to be permanently stayed upon fulfillment of the sentence imposed on Count 1.

The judgment will be reversed as to appellant Wright. There is no evidence that she was present on the premises or aware of the content of the films introduced as exhibits.

The fact that she was an officer of the company does not establish knowledge of the specific films.

The fact that the officer told her that in his opinion some films, which the officer viewed, were obscene does not establish:

1. That the films the officer saw prior to his conversation were in fact obscene, or

2. That the defendant Wright was aware of the content of the films seized.

The Sarong Gals case is distinguishable on at least two grounds:

1. The case of People ex rel. Hicks v. Sarong Gals [1974] 42 Cal.App.3d 556 was civil not criminal.

2. As pointed out at page 561 thereof:

"Moreover, a showing of personal knowledge on the part of the owner or operator of the premises is not a prerequisite to relief under the Red Light Abatement Law."

The judgment is affirmed in all respects as to appellant Johansen except as to the sentence imposed. The sentence is vacated as to Johansen and the trial court is directed to resentence him in accordance with the foregoing opinion. The judgment is reversed as to appellant Wright.

Cole
Presiding Judge

Allen
Judge

I concur as to appellant Johansen. I dissent as to appellant Wright.

Scienter can be proved by circumstantial evidence. (People v. Kuhns [1976] 61 Cal.App.3d 735, 758.) Signs on the outside of the premises stated that "adult movies" were being shown inside. When the owner of the bar lives in the same general community, even though there is no direct evidence of her presence on the business permises, one could reasonably infer that she was aware of what was happening with respect to same. While this, standing by itself, is probably not sufficient to sustain a conviction there is credible evidence of her participation in a conversation wherein she, in effect, admitted knowing that obscene films were being shown. As a matter of fact, she contended she had obtained a license for that very purpose.

I believe it is unrealistic to require that the people prove, as to an owner, an awareness of the actual contents of a specific film. As our viewing of the films demonstrated, this type of film is fungible. In view of the approximity of

the conversation and viewing, I do not deem the fact that the latter was subsequent to the former as significant. The effect of the majority's decision is to grant virtual immunity to owners who operate with managers.

Wenke
Judge

APPENDIX B

APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

FILED
MAY 18 1977
County Clerk
By B. R. Seale, Deputy

PEOPLE OF THE STATE OF CALIFORNIA)
Plaintiff and Respondent,)
vs.)
LARRY STEVEN JOHANSEN and)
MARGARET SARA WRIGHT,)
Defendants and Appellants)

Superior Court No. CR A 14575
Municipal Court of the
Whittier Judicial District
No. M 106977

ORDER DENYING PETITION FOR REHEARING AND/OR CERTIFICATION

The petition of appellant, Johansen, for reconsideration, or in the alternative for certification to the Court of Appeal is denied. The petition of the People for rehearing, modification, or certification to the Court of Appeal is denied. Wenke, J. would grant the petition of the People for rehearing as to appellant Wright only, but otherwise joins in this order.

Cole
Presiding Judge

Allen
Judge

Wenke
Judge

APPENDIX "C"

1973 Los Angeles Sheriff's Survey of Californians' Views on Obscenity and Pornography

Complier: Brad D. Sanders February 3, 1976

	Population of[1] California Counties		Urban Population[2] of California Counties	Sheriff's Surveys[3] Received by California Counties	
	Number	%	Percent	Number	%
Alameda	(1,093,400)	5.3	99.0	(101)	9.2
Alpine	(600)	0.0	0.0	(0)	0.0
Amador	(14,000)	0.1	0.0	(19)	1.7
Butte	(110,600)	0.5	63.8	(4)	0.4
Calaveras	(15,200)	0.1	0.0	(13)	1.2
Colusa	(12,500)	0.1	30.9	(2)	0.2
Contra Costa	(585,100)	2.8	93.6	(5)	0.4
Del Norte	(15,000)	0.1	38.9	(0)	0.0
El Dorado	(50,400)	0.2	41.8	(14)	1.3
Fresno	(436,600)	2.1	75.1	25)	2.3

	Population of California Counties[1]		Urban Population of California Counties[2]	Sheriff's Surveys Received by California Counties[3]	
	Number	%	Percent	Number	%
Glenn	(18,000)	0.1	39.8	(9)	0.8
Humboldt	(102,300)	0.5	47.1	(2)	0.2
Imperial	(78,100)	0.4	67.8	(4)	0.4
Inyo	(16,900)	0.1	22.5	(0)	0.0
Kern	(342,000)	1.6	80.2	(29)	2.6
Kings	(67,600)	0.3	54.9	(8)	0.7
Lake	(22,700)	0.1	29.9	(1)	0.0
Lassen	(17,700)	0.1	39.3	(1)	0.0
Los Angeles	(6,967,000)	33.6	98.7	(146)	13.2
Madera	(44,100)	0.2	49.1	(4)	0.4
Marin	(215,800)	1.0	92.4	(15)	1.4
Mariposa	(7,400)	0.0	0.0	(8)	0.7
Mendocino	(55,200)	0.3	34.5	(0)	0.0
Merced	(112,100)	0.5	50.0	(3)	0.3
Modoe	(7,800)	0.0	39.3	(3)	0.3

	Population of California Counties[1]		Urban Population of California Counties[2]	Sheriff's Surveys Received by California Counties[3]	
	Number	%	Percent	Number	%
Mono	(6,200	0.0	0.0	(0)	0.0
Monterey	(261,500)	1.3	74.6	(28)	2.5
Napa	(86,200)	0.4	57.9	(5)	0.4
Nevada	(30,100)	0.1	19.8	(0	0.0
Orange	(1,605,700)	7.7	98.8	(81)	7.3
Placer	(87,300)	0.4	40.5	(10)	0.9
Plumas	(13,100)	0.1	29.6	(0)	0.0
Riverside	(500,800)	2.4	78.6	(14)	1.3
Sacramento	(676,000)	3.3	95.1	(43)	3.9
San Benito	(19,200)	0.1	42.0	(0)	0.0
San Bernardino	(698,200)	3.4	89.8	(74)	6.7
San Diego	(1,482,200)	7.1	93.5	(124)	11.2
San Francisco	(681,200)	3.3	100.0	(0)	0.0
San Joaquin	(300,400)	1.4	76.9	(20)	1.8
San Luis Obispo	(117,800)	0.6	75.5	(13)	1.2

	Population of California Counties[1]		Urban Population of California Counties[2]	Sheriff's Surveys Received by California Counties[3]	
	Number	%	Percent	Number	%
San Mateo	(564,500)	2.7	98.3	(18)	1.6
Santa Barbara	(275,900)	1.3	88.5	(24)	2.2
Santa Clara	(1,163,600)	5.6	97.5	(89)	8.1
Santa Cruz	(142,600)	0.7	75.0	(2)	0.2
Shasta	(84,200)	0.4	49.6	(3)	0.3
Sierra	(2.500)	0.0	0.0	(4)	0.4
Siskiyou	(34,800)	0.2	25.4	(5)	0.4
Solano	(181,100)	0.9	92.8	(20)	1.8
Sonoma	(231,900)	1.1	58.6	(15)	1.4
Stanislaus	(207,800)	1.0	69.9	(15)	1.4
Sutter	(44,300)	0.2	52.6	(0)	0.0
Tehama	(31,200)	0.2	38.3	(4)	0.4
Trinity	(8,700)	0.0	0.0	(3)	0.3
Tulare	(200,400)	1.0	53.8	(21)	1.9
Tuolumme	(25,500)	0.1	14.0	(5)	0.4

	Population of California Counties[1]		Urban Population of California Counties[2]	Sheriff's Surveys Received by California Counties[3]	
	Number	%	Percent	Number	%
Ventura	(423,000)	2.0	92.4	(19)	1.7
Yolo	(100,000)	0.5	75.4	(12)	1.1
Yuba	(44,900)	0.2	71.4	(16)	0.1
TOTAL	(20,741,000)	99.8	-	(1,103)	100.0

5.

Number of surveys without postmark	239
Number of surveys without envelopes	95
Number of unopened envelopes	18
Subtotal	352
Number of surveys with postmark	1,103
TOTAL	1,455

Percentages may not add to 100.0 due to rounding

CHARACTERISTICS OF CALIFORNIA'S POPULATION

Compiler: Brad D. Sanders February 3, 1976

	1970 U. S. Census of Population Percent	Sheriff's Survey Forecast Percent	Sheriff's Survey Results Percent
Distribution by Place of Residence:			
Urban	90.9[1]	65.0	-
Rural	9.1	35.0	-
Distribution by Race:			
White	73.5[2]	78.0	84.7
Black	7.0	7.0	7.3
Spanish Language or Spanish Surname	15.5	10.0	6.5
Other	4.0	5.0	1.2
	100.0	100.0	99.7

	1970 U. S. Census of Population Percent	Sheriff's Survey Forecast Percent	Sheriff's Survey Results Percent
Distribution by Sex:			
Male	48.3[3]	49.3	48.4
Female	51.7	50.7	50.2
	100.0	100.0	98.6
Distribution by Marital Status:			
Single	25.1[5]		18.3
Married	60.4		66.9
Separated	1.4		-
Widowed	6.8		4.9
Divorced	5.5		8.2
	99.2		98.3

	1970 U. S. Census of Population Percent	Sheriff's Survey Forecast Percent	Sheriff's Survey Results Percent
Distribution by Years of School Completed:			
	(25 years old and over)		
Less than 6 years	4.3		.4
7-11 years	29.0		8.7
12 yeqrs (High School Graduate)	32.8		36.8
13-14 years (2 yrs. college)	-		30.5
13-15 years (1-3 yrs. of college)	16.4		-
16 years (College graduate)	13.4		19.3
	95.9		95.7
Distribution by Income:			
Less than 4,999	31.8[7]		7.6
$5,000 to $6,999	10.9		13.2
$7,000 to $9,999	16.4)		
$10,000 to $14,999	21.4) 52.6		

	1970 U. S. Census of Population Percent	Sheriff's Survey Forecast Percent	Sheriff's Survey Results Percent
Distribution by Income:			
$15,000 to $24,999	14.8) 52.6		
$7,000 to $12,999			32.4)
$13,000 to $18,999			21.0) 62.5
$19,000 to $25,000			9.1)
$25,000 or More	4.4		8.2
	99.7		91.5
Median Age:	28.1 years		39.5 years

Census percentages may not add to 100.0 due to rounding

References:

1. 1970 U.S. Census of Population, (U.S. Department of Commerce, Bureau of the Census), Vol. 1, Part 6, Section 1., p. 6-5.
2. Ibid., p. 6087.
3. Ibid., p. 6-79.
4. Ibid., p. 6-88.
5. Ibid., p. 6-97
6. Ibid., p. 6-383.
7. Ibid., ("Families" and "Unrelated Individuals" combined)

APPENDIX D

Hacienda Heights, California
3-9-76

I, Milton Eugene Buergey, 15469 Shady Bend Drive, Hacienda Heights, California, 330-7397, age 38, make the following declaration.

In February 1976, I was a juror at the trial of the People vs Johanson, and Wright in Whittier Municipal Court. I would feel that most of the jurors in that case were very prejudiced against the Defendants. They had a closed mind towards the subject and felt that anyone engaged in sexual entertainment was bad. I recall that two of the women jurors, expressed views that the Defendants were guilty before we started deliberating and heard all of the evidence. I cannot recall their names, but one was an older lady that sat next to a younger lady that had been in the air force. I recall that after the prosecution rested their case, the foreman of the jury, Joseph Irving, stated "Why did he stop now, he didn't prove anything", meaning the District Attorney. Yet, when we got to the jury room, Irving took the position that the Defendants were guilty, even though he did not indicate that the Defendants did anything to make him feel the Defendants were guilty. When we got to the jury room, I suggested that we go over the three points of law to see if the films were obscene, as per the Judge's discussion. However, no one wanted to discuss the points of law. They wanted to discuss if we had the right Defendant. I told them that the Defendants were not the issue, but that the issue we were to decide on was the guilt or innocence of

the Defendants, within the guidelines of the law as explained by the Judge. The jurors still refused to discuss the law, but instead took several votes to see if the Sheriff had the right defendants. The jurors never discussed the three points of law, in total. All we discussed was the issue of prurient interest. We did not discuss the other two points at all. I took the position that the prosecution had not proved prurient interest and Mr. Irving kept badgering me about the issue. All of the jurors kept discussing this amongst themselves, without listening to my discussions. When I stated that I should be heard and that all twelve of us should enter the discussion, they called me stupid. They took several votes and I would put in a blank, since I could not be heard and they again called me stupid. I started to express my views and then Mr. Irving would tell me that I was wrong. When I agreed with his points, Mr. Irving immediately wrote down guilty as to Mrs. Wright and the jury did not discuss the other two points at all. I had wanted to put the three points on the blackboard, and with the discussions about having the right Defendant and whether Mr. Johanson was guilty, I forgot to, and because of the badgering of me by the other jurors, the other points slipped my mind until after we got in the jury box to give our verdict. At this time, I wanted to voice my opposition, but I was afraid that I would be harassed and be called stupid. When the judge polled, I wanted to say "Not guilty", but I was afraid I would be called stupid. I should like to make it perfetly clear that I have not in any

way, changed my mind about the guilt or innocence of the Defendants since the trial. I have always felt that the prosecution did not at any time, prove that the Defendants were guilty, not because I felt the Defendants were guilty or that the evidence showed they were guilty, but simply because I was harassed and badgered by the other jurors. I recall that during the whole trial, I was a juror in the case, and up until the time we started deliberating, there was constant comments about the case by the jurors. They would talk about the films being obscene. They would also state that they were shocked. I can also recall that there was a lady that sat next to me, I do not remember her name, but she was short, about 4'8" or 4'9". When the films were shown, she would constantly make remarks about how disgusting they were, and make gutteral sounds about the films when they were shown. I also her [sic] discuss that the films were nauseating, and sick in the halls, to other jurors before we started deliberating. When we got into the jury room, several of the men stated they wanted to see the films again, not to see if they were obscene, but just for entertainment. I do not know if they were joking or not, but there was a lot of joking in this vein, and the jokes were made as if the trial were something to make fun of, and not a serious matter concerning someone's guilt. At the time I had to tell them that someone could have a record for life, because of what we decided, and that they should take it seriously. When we got into the jury room, the jurors discounted all the evidence regarding the surveys made by both the defense and the prosecution.

They threw the Sheriff's survey completely out, because the jurors stated that the District Attorney should not have used it, because it did the prosecution more harm than good. The jurors would not accept the defense survey because they said that the professor who made the survey stated that "you should show pornography to your kids". They also referred to kids as being young children. I told them that the professor simply stated that people should not think of sex as being dirty, and not punish children if they came upon a sexual book. They all called me a liar when I tried to explain the professor's position and the jurors kept telling me that the professor insisted parents should furnish pornography to elementary aged children. On the basis of this, the jurors refused to accept the district attorney's survey, because it did not help their positions that the Defendants were guilty, and they would not accept the defense survey because they mis-stated the results of it. I remember that when we got into the jury assembly room in the morning, I heard one of the jurors discuss an article in the Los Angeles Times about pornography. After we were picked, I went to lunch with Jim Fontrayer. At this time, he told me that Jim Duffy had read the article and was discussing it with the other jurors. Even though the Judge told us not to read that specific article, Mr. Duffy did, just for curiosity. I can recall that some of the jurors mentioned the Maurice Weiner sex trial, but I cannot recall the details or who talked about it. I recall that the jurors would constantly try to discuss the cases with me. It got

so to the point that I would take the steps in the court house, rather than the elevators, because I would not want to discuss the case, since the judge told us not to. The only reason that I cannot recall all of the names of the jurors that discussed the case, and all the specific issues they talked about, since I tried to keep away from them when they discussed these matters. I would definitely state that was no free exchange of ideas in the jury room. I was never allowed to air my views. Whenever I would state something that was opposite to the majority's, they would harass me and start to scream and talk over me. I recalled that one lady, who was older and small and spoke with a European accent kept referring to the District Attorney as "our attorney". She kept saying "What is our attorneys name?", referring to the district attorney. I recall that Jim Fontrayer kept stating that he did not feel the Manager was guilty and that all the other jurors kept shouting at him, and harassing him. Jim did not give me the impression that he was allowed to air his view. I definitely did not get the impression that the jury listened to the evidence. They kept saying that the District Attorney did not prove his point, yet they still found that the Defendant was guilty. The jury discussed the fact that they felt that the films were just "dirty" and "I don't care what the law is." They just kept saying "They are dirty, nasty films . . .so they are guilty." Nobody discussed any area of the law, except prurient interest. I do recall that there were discussions aimed especially at me, and other jurors to the

effect "Do you want your children exposed to this?" Those words were used. The jurors would interject their own personal views into the discussions. There was a group of ladies in the court room that were an anti-obscenity group. The jurors were at first curious as to who they were and when they found out, some of the jurors mentioned that the group had closed down a pornographic book store in Whittier. There was some discussion about them, but I cannot recall what. I had asked Mr. Duffy why he read the article, and he said he couldn't resist it, his curiosity got the best of him. He said that he read the whole article and it was a "duzey". He said it was against obscenity. When the jurors discussed the case, they would constantly refer to victims of obscenity as children, rather than a consenting adult who would go into a bar to see the movies. I was harassed so much and my views were stiffled so badly, that on several occasions, I considered going to the Bailiff and asking him to tell the judge to take me off because I couldn't work with the jury. The only reason I voted as I did was I was physically exhausted and tired of being called stupid.

I have read the above six pages and agree they are correct to the best of my recollection and knowledge, and make this under penalty of perjury.

/S/ MILTON EUGENE BUERGEY

WITNESSED BY M. FROST

COUNTY OF LOS ANGELES-SHERIFF'S DEPARTMENT-SUPPLEMENTARY REPORT

DATE 19 March 76 FILE NO 475-21842-0494-131

EXHIBITION OF OBSCENE MATTER -
C. 311.2 P.C. Action Taken ACTIVE-Date Set to Hear Motion for New Trial
Additional Info.

v. Loc: CLYDES BAR
13321 Imperial Hwy. Norwalk Sta. Dist.

D. #1. WRIGHT, Margaret Sara Not Booked
#2. JOHANSEN, Larry Steven " "

8 March 76 In Whittier Municipal Court

Re: Complaint M 106977

Both defts. present.

Motion for new trial due to jury misconduct made be Defts.' Attorney Scholz. Hearing date for Motion set for 3-22-76 at 1330 hrs.

Representations: For the Peo. - DDA Harper
For the Deft. - Scholz

9 March 76 Additional Information:

On 3-9-76 D.D.A. Harper advised Dep. Raffa that one of the jurors had complained to Defts.' attorney Scholz that the jury was guilty of misconduct. Mr. Harper requested that Dep. Raffa and Sgt.

Hippler conduct an interview with the juror to determine the extent of the alleged misconduct of the jury.

On 3-9-76 at 1430 hrs. Sgt. Hippler and Dep. Raffa contacted the juror, Mr. Milton E. Huergey at 15469 Shadeylane, Hacienda Hieghts. [sic] Dep. Raffa advised Mr. Buergey of his rights as per SHAD 477 and then questioned him as to the events which led him to believe the jury was guilty of misconduct.

Mr. Buergey indicated that one of the jurors had read an article in the Los Angeles Times, contrary to an admonition by the Judge not to read the article. This article dealt with pornography although it had no bearing, directly, on the case involved. Mr. Buergey's second complaint was that the jurors discussed the case among themselves during the trial.

Mr. Buergey was asked if he felt that the jury was in any way swayed from delivering an honest and just verdict. He stated that he now felt that justice had been served and that he did not think that he sould [sic] have made the complaint in the first place.

It was apparent from Mr. Buergey's comments that he experienced personality conflicts with some of the other jurors, during the deliberation phase of the trial. Although he was not happy with the methods employed by the jury to reach their verdict, he did feel that it was a proper verdict.

J. affa, Dep. #073834
App: C. W. Montgomery, Captain
Vice Bureau - Murata

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1977

No. 77-249

LARRY STEVEN JOHANSEN,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

BRIEF FOR RESPONDENT IN OPPOSITION

JOHN K. VAN DE KAMP
District Attorney of
Los Angeles County

RODERICK W. LEONARD
Deputy District Attorney

Attorney for Respondent

Of Counsel:

HARRY B. SONDHEIM
Head, Appellate Division

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Statutes

IN THE

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ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

BRIEF FOR RESPONDENT IN OPPOSITION

I.

OPINION BELOW

The Petition correctly sets forth the order below and the absence of an opinion therein.

II.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

III.

QUESTIONS PRESENTED

1. IS A JURY COMPETENT TO RULE ON COMMUNITY STANDARDS IN AN OBSCENITY CASE BASED ON THEIR OWN KNOWLEDGE OF THE VIEWS OF THE AVERAGE PERSON IN THEIR COMMUNITY WHERE THEY ARE INSTRUCTED TO MAKE AN OBJECTIVE DETERMINATION BASED ON A STATEWIDE STANDARD, HAVE THE ALLEGEDLY OBSCENE FILMS IN EVIDENCE, AND THE BENEFIT OF SURVEYS OF STATEWIDE OPINION PRESENTED BY EACH SIDE?
2. IS A DEFENDANT ENTITLED TO A REVERSAL AS A MATTER OF DUE PROCESS BASED ON THE IMPLIEDLY UNCREDITED CLAIM OF A DISGRUNTLED JUROR THAT CERTAIN OTHER JURORS, ACTING ON THEIR OWN, VIOLATED TRIAL COURT ADMONITIONS RELATING TO PREMATURE DISCUSSION OF THE CASE AMONG THEMSELVES AND RELATING TO AVOIDANCE OF NEWS AND COMMENT CONCERNING OBSCENITY IN GENERAL AND A PUBLICIZED SEX CASE NOT RELATED TO THE FACTS HEREIN?
3. MAY A SEARCH WARRANT FOR THE SEIZURE OF ALLEGEDLY OBSCENE FILM BE EXECUTED ON THE BASIS OF A PREVIOUS EX PARTE JUDICIAL DETERMINATION WHERE STATE LAW (1) REQUIRES THE PROSECUTION TO FIRST SHOW PROBABLE CAUSE THAT PRESUMPTIVELY PROTECTED FILMS ARE OBSCENE BY AN AFFIDAVIT

WHICH FOCUSES SEARCHINGLY ON THE QUESTION OF OBSCENTIY AND (2) PROVIDES THE OWNER WITH, INTER ALIA, A MOTION FOR A PROMPT PRE-TRIAL ADVERSARY PROCEEDING TO REVIEW SUCH DETERMINATION?

IV.

CONSTITUTIONS AND STATUTES INVOLVED

The Constitutional provisions are adequately set forth in the petition except as to the following set forth in pertinent part:

"AMENDMENT XXI

Repeal of Prohibition

"Repeal of 18th Amendment

* * *

"Control of Interstate Liquor Transportation

"Sec. 2. The transportation or imposition into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

* * *

Cal.Pen. Code § 1525. Issuance; probable cause; supporting affidavits

"A search warrant cannot be issued but upon probable cause, supported by affidavit, naming or describing the person, and particularly describing the property and place to be searched."

Cal. Pen. Code § 1526. Issuance; examination of complainant and witnesses; taking and subscribing affidavits; transcribed statements in lieu of written affidavit

"(a) The magistrate may, before issuing the warrant, examine on oath the person seeking the warrant and any witnesses he may produce, and must take his affidavit or their affidavits in writing, and cause same to be subscribed by the party or parties making same.

"(b) In lieu of the written affidavit required in subdivision (a), the magistrate may take an oral statement under oath which shall be recorded and transcribed. The transcribed statement shall be deemed to be an affidavit for the purposes of this chapter. In such cases, the recording of the sworn oral statement and the transcribed statement shall be certified by the magistrate receiving it and shall be filed with the clerk of the court. In the alternative in such cases, the sworn oral statement shall be recorded by a certified court reporter and the transcript of the statement shall be certified by the reporter, after which the magistrate receiving it shall certify the transcript which shall be filed with the clerk of the court."

Cal. Pen. Code § 1536. Disposition of property taken; retention subject to order of court in which offense triable

"All property or things taken on a warrant must be retained by the officer in his custody, subject to the order of the court to which he is required to return the proceedings before him, or of any other court in which the offense in respect to which the property or things taken is triable."

Cal. Pen. Code § 1538.5. Motion to return property or suppress evidence

(a) Grounds

"(a) A defendant may move for the return of property or to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure on * * either of the following grounds:

"(1) The search or seizure without a warrant was unreasonable

"(2) The search or seizure with a warrant was unreasonable because (i) the warrant is insufficient on its face; (ii) the property or evidence obtained is not that described in the warrant; (iii) there was not probable cause for the issuance of the warrant; (iv) the method of execution of the warrant violated federal or state

constitutional standards; or (v) there was any other violation of federal or state constitutional standards."

* * *

Cal. Pen. Code § 1539. Traverse of grounds for issuance; testimony; depositions

"(a) If a special hearing be held in the superior court pursuant to Section 1538.5, or if the grounds on which the warrant was issued be controverted and a motion to return property be made (i) by a defendant on grounds not covered by Section 1538.5; (ii) by a defendant whose property has not been offered or will not be offered as evidence against him; or (iii) by a person who is not a defendant in a criminal action at the time the hearing is held, the judge or magistrate must proceed to take testimony in relation thereto, and the testimony of each witness must be reduced to writing and authenticated by a shorthand reporter in the manner prescribed in Section 869."

* * *

Cal. Pen. Code § 1540. Restoration of property; property not described in warrant; no probable cause.

PROPERTY, WHEN TO BE RESTORED TO PERSON FROM WHOM IT WAS TAKEN.

"If it appears that the property taken is not the same as that described in the warrant, or that there is no probable cause for believing the existence of the grounds on which the warrant was issued, the magistrate must cause it to be restored to the person from whom it was taken."

V.

STATEMENT OF THE CASE

Clyde's beer bar is a building located on Imperial Highway emblazoned with signs advertising "Adult Movies, Semi-Nude, Beer", "Open 11 a.m. - 2 a.m.", "Clyde's, Adult Movies". (R.T. 254-255.)[1/] Inside is a bar and rows of chairs facing a stage. (R.T. 264.) Over the stage is a screen upon which two self-winding projectors mounted next to the ceiling alternate in showing, spliced-together segments of sexually explicit films (found obscene below). (R.T. 265-266.) The patrons were male, the only women being barmaids and dancers. (R.T. 265.) Beer was served (R.T. 268), the premises being licensed to serve beer (R.T. 257).

On December 8, 1975 (R.T. 262), undercover sheriff deputies entered Clyde's,

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1. R.T. refers to Reporter's Transcript.

ordered beer, and watched the entire sequence of film (nine segments, some of which were untitled), each deputy in turn visiting the restroom to write down titles and the sequence after he had seen approximately two segments, so that between them all nine segments were described (R.T. 268-269).

Based thereon (R.T. 270-271) the deputies sought and procured a search warrant specifically describing the films (R.T. 270-271) from the Honorable Herbert J. Adden, Judge (Petition at 4) who had himself observed the film supporting all nine counts in their entirety prior to issuance of the warrant (Docket M-106377, p. 1).

Appellant was the manager of the premises (R.T. 278).

On December 10, 1975 a complaint was filed charging petitioner with nine counts of violation of Penal Code section 311.2 (exhibition of obscene matter) (Docket p. 1). On December 19, 1975 appellant, represented by counsel, was arraigned and noticed a motion pursuant to Penal Code section 1538.5 (Docket p. 1) which was set for January 19, 1976 (no objection being noted in the docket (Docket p. 1). On January 21, 1976 the motion was heard and denied

(Docket p. 2).

On January 21, 1976 jury trial commenced, being concluded with a guilty verdict against petitioner on February 11, 1976. (Docket pp 2-7.)

Deputy Kenealy testified that he had specialized in obscenity investigation for the past six and one-half years (R.T. 318), including undercover work (R.T. 318), that he had viewed and considered 2,000 hours of pornographic films, 3,000 pornographic magazines, and 500 hours of pornographic live conduct performances (R.T. 319), that he had attended three seminars on the subject, speaking at the last one (R.T. 317), that he had lectured on the subject to civic groups 150 to 175 times (R.T. 318), was an advisor on the subject to four official agencies (local, state, and national) (R.T. 319), had taken a college course in the technical aspects of research methodology given by Dr. Knowles at U.S.C. (R.T. 324) and had received special tutoring on introduction in the area of surveying techniques given by Drs. Krasner and Adleman at Pepperdine College (R.T. 325).

The most recent statewide survey in which he participated involved survey questionnaires formulated with the

assistance of Drs. Adleman and Krasner of Pepperdine College (R.T. 325). Five thousand surveys were distributed in all 58 California counties (R.T. 331) in their most populated cities and in other cities selected at random (R.T. 326) with 1,444 surveys being completed and returned (R.T. 332). This compares with 1,500 surveys used by the Gallop poll for a national survey (R.T. 332-333). The returned surveys were tabulated and analyzed by Drs. Adleman and Krasner (R.T. 325-326).

Each of the films were described to Deputy Kenealy, who based on his background and having seen them, gave his opinion as to each that they were each obscene (R.T. 363-370). Kenealy also testified that on projector number one (including 4 segments) he counted 40 separate acts of coitus, i.e., one every one and one-fifth minute (R.T. 381-382) and on projector number two (including 5 segments) there were 43 acts depicted, i.e., one every one and one-fifth minute (R.T. 382). In addition to coitus, other graphically depicted sexual acts appeared. For example, in "Roof Top Rape" there were 63-plus such acts over the ten-minute length of the film, i.e., one approximately every nine and three-fifth seconds

(R.T. 378-379). In the eleven-minute film "Two Crooks Meet A Hot Job" there were ten scenes of coitus, three of masturbation, two of ejaculation, eleven of fellatio, seven of cunnilingus, one of sucking of the breast, five of fondling the breast, one of fondling of the penis, two of fondling of the vagina, for a total of 42 acts, plus the continuous troilism, i.e., graphically depicted sexual act every six and two-fifth seconds. (R.T. 380-381.)

VI.

ARGUMENT

A

A JURY IS COMPETENT TO RULE ON COMMUNITY STANDARDS IN AN OBSCENITY CASE BASED ON THEIR OWN KNOWLEDGE OF THE VIEWS OF THE AVERAGE PERSON IN THEIR COMMUNITY WHERE THEY ARE INSTRUCTED TO MAKE AN OBJECTIVE DETERMINATION BASED ON A STATE-WIDE STANDARD, HAVE THE ALLEGEDLY OBSCENE FILMS IN EVIDENCE, AND THE BENEFIT OF SURVEYS OF STATEWIDE OPINION PRESENTED BY EACH SIDE

Expert testimony as to community standards is no longer required, either as a matter of constitutional law (Hamling v. United States, 418 U.S. 87, 41 L.Ed.2d

590, 94 S.Ct. 2887, 2901; Paris Adult Theatre I v. Slaton, 413 U.S. 49, 56, 93 S.Ct. 2628, 2634, 37 L.Ed.2d 446 [1973]) nor as a matter of California law (Penal Code section 311.2; People v. Enskat, 33 Cal. App.3d 900, 914). The juror is entitled to draw on his own knowledge of community standards (which is comparable to his knowledge of the propensities of a "reasonable" person in other areas of the law) (Hamling, supra at 94 S.Ct. 2901). The constitutional concern is not one of geography, but merely that the jury be instructed to "consider the entire community [however defined geographically] and not simply their own subjective reactions, or the reactions of a sensitive or of a callous minority" (Smith v. United States [1977] ___U.S.___, 52 L.Ed.2d 324, 338; 97 S.Ct. 1756, 1766; see also Miller v. California [1973] 413 U.S. 15, 33; 93 S.Ct. 2607, 2620; 37 L.Ed.2d 419 ["impact on an average person"]). Such instructions are subject to review (Smith, supra at 93 S.Ct. 1766). Here the jury was instructed (1) not to use subjective personal standards but inter alia to make an "objective" determination of what is "acceptable to the community as a whole" and (2) to use a statewide standard. (Modified

CALJIC 16.186 [given] [attached as Appendix A].)

Furthermore, the jury could consider the California obscenity statute (which fails to provide a separate standard for "consenting adults" although it does for "clearly defined deviant sexual groups" [see Penal Code section 311(a)[1]) as "relevant evidence of the mores of the community whose legislative body enacted the law" (Smith, supra at 97 S.Ct. 1767).

The films (as hard core pornography) speak for themselves (Enskat, supra at 914; Paris Adult Theatre I, supra at 413 U.S. 56, 93 S.Ct. 2634, n. 6) and their placement in evidence herein removed the necessity for expert testimony (Paris Adult Theatre, supra at 413 U.S. 56, 93 S.Ct. 2634).

Thus the sufficiency of the expert testimony becomes an academic question, since even if insufficient, we must then assume in support of the judgment that the jury disregarded it (Hamling, supra at 94 S.Ct. 2911) as they are entitled to do (Enskat, supra at 914-915).

As to the expert testimony introduced concerning community standards, the prosecution survey covered 58 counties while the defense survey covered only 20. (R.T. 325,

697-698, 754.) The prosecution survey, although conducted by the sheriff's office, was prepared by Dr. Adleman (in collaboration with Dr. Krasner) who concededly concluded that it was a valid survey (R.T. 775). Dr. Fitche's survey (used by the defense) was concededly not perfect (R.T. 775). The criticisms of the prosecution survey leveled by the defense as to tabulation of returns, demographic data, and formulation of questions were ably answered in the prosecution's closing argument (R.T. 777-780), here incorporated by reference. (Cf. Miller v. California, supra at 413 U.S. 31, 93 S.Ct. 2619, n. 12.)

B

DEFENDANT IS NOT ENTITLED TO A REVERSAL AS A MATTER OF DUE PROCESS BASED ON THE IMPLIEDLY UNCREDITED CLAIM OF A DISGRUNTLED JUROR THAT CERTAIN OTHER JURORS, ACTING ON THEIR OWN, VIOLATED TRIAL COURT ADMONITIONS RELATING TO PREMATURE DISCUSSION OF THE CASE AMONG THEMSELVES AND RELATING TO AVOIDANCE OF NEWS AND COMMENT CONCERNING OBSCENITY IN GENERAL AND A PUBLICIZED SEX CASE NOT RELATED TO THE FACTS HEREIN

A juror's "second thoughts" about his verdict is not, of course, a sufficient basis in law or fact on which to predicate a new trial (see Penal Code section 1181; Witkin, California Criminal Procedure [1963 ed.] and 1975 Supp., § 570; People v. Orchard [1971] 17 Cal.App.3d 568, 573).[2] Thus admission of jurors' declarations only as to objective facts and not as to subjective reasoning processes "protects the stability of verdicts" (People v. Hutchinson [1964] 71 Cal.2d 342, 350).

Both the Buergey declaration and Deputy Raff's report of a subsequent interview with Buergey were, by agreement of the parties, considered by the trial court (E.S.S.A. p. 4, lines 11-13). Together and even in themselves they give rise to conflicting inferences. "Under these circumstances, we

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2. Significantly, the complaining juror (Beurgey) has apparently repudiated his "second thoughts" and now feels that justice had been served and that the verdict was a proper one (Engrossed Settled Statement on Appeal [hereinafter referred to as E.S.S.A.] Exhibit 2, p. 2). Hence his verdict today would be guilty and the result would not have changed. It should be noted that Deputy Raffa's report (E.S.S.A., Exhibit 2) was stipulated to be admissible (E.S.S.A., p. 4, lines 11-13).

are bound by the lower court's implied factual finding" (People v. Brown [1976] 61 Cal.App.3d 476, 483), i.e., that there was no showing of jury misconduct and that Buergey was essentially indulging in second thoughts (E.S.S.A. p. 4, lines 13-18, 22-26). The conflicting inferences arise from Buergey's own internal conflicts (regretting that he "was swayed so easily" and feeling that a polygraph "would also help me in determining what's really in my mind too" [E.S.S.A. Exhibit 1, p. 3]) and his conflicts with the rest of the jury whom he terms a "clique" and these "chosen few" (E.S.S.A. Exhibit 1, p. 2). He had admittedly told the majority that whatever they might decide "when they were finished, I would then hang that jury" and later pushed his chair away from the table (E.S.S.A. Exhibit 1, p. 2). The tone of the Buergey letter alternates between self-righteousness and pangs of conscience.

Although the foregoing factors are all subjective they effect Buergey's credibility (and perception) as to the "objective" statements which occasionally intrude into his otherwise subjective discourse. When he indicates that two of the women jurors had expressed views that defendants were guilty

before the beginning of deliberations, he is expressing a conclusion based on his (biased) interpretation of what those jurors actually said (or intended). Such a conclusion (lacking an exact quote) was properly given little evidentiary weight (cf. People v. Henderson [1947] 79 Cal.App.2d 94, 123). It also seems to enter into the subjective reasoning processes of the women jurors (perhaps indicating a tentative conclusion, or hypothesis) as to which Buergey's declaration is not competent evidence (People v. Hutchinson [1945] 71 Cal.2d 342, 350).

The alleged statement attributed to juror Duffy that he read the L.A. Times article in spite of the court's instructions is hearsay presumably covered by the prosecution's initial objection to competent evidence (E.S.S.A. p. 4, line 5) apparently never withdrawn as to specific matter in the Buergey declaration (cf. E.S.S.A. p. 4, lines 11-13). In any case it was properly given little weight since Duffy could well have been kidding a naive Buergey along and there is no indication that the news article had any relevance to the instant case. (Contrast People v. Lessard [1962] 58 Cal.2d 447, and People v. Wong Loung [1911] 159 Cal. 520, cited by appellant, which dealt

with articles about the case under consideration.)

As to the alleged failure to obey the court's admonition to refrain from discussing the case (or such cases as the Maurice Weiner sex trial), "[g]eneral discussion of the jurors during recess, while not to be approved, could not, as a matter of law, be prejudicial" (People v. Henderson [1947] 79 Cal.App.2d 94, 123).

Finally, as to alleged harrassment by his fellow jurors the trial court found that Buergey was not intimidated (E.S.S.A. p. 4, line 17). This finding was supported by Buergey's description of his threats to hang the jury, his pushing his chair away from the table, his announcement to the other jurors "that it would do no good to vote on this subject and one way or another, we would return to this subject" (E.S.S.A. Exh. 1, p. 2). At one place Buergey describes his guilty vote as being somewhat premature due to the fact that "I didn't think of the other two points of law until the jury was excused and I was leaving the courthouse" (E.S.S.A. Exh. 1, p. 2.) Nevertheless, despite these second thoughts, Buergey is apparently now of the opinion that justice was served and that the verdict was proper (E.S.S.A. Exh. 2

p. 2). It follows that as to Buergey's own subjective thought processes, the appellants were not prejudiced. As noted in People v. Orchard (1971) 17 Cal.App.3d 568, 574, "[j]urors may be expected to disagree during deliberations, even at times in heated fashion". Thus, "[t]o permit inquiry as to the validity of a verdict based upon the demeanor, eccentricities, or personalities of individual jurors would deprive the jury room of its inherent quality of free expression" (id. at 574).

Unlike Turner v. Louisana (1965) 379 U.S. 466, 13 L.Ed.2d 424, 85 S.Ct. 546 (involving a state practice of allowing deputy sheriffs to serve both as witnesses and jury custodians) where as here no procedure adopted by the State is to be faulted, the rule of Stroble v. California (1951) 343 U.S. 18 , 96 L.Ed. 872, 72 S.Ct. 599, and Irvin v. Doud (1961) 366 U.S. 717, 6 L.Ed. 2d 751, 81 S.Ct. 1639, should be applied, requiring a substantial showing of prejudice in fact before a due process violation can be found. (See Harlan dissent in Parker v. Gladden [1966] 385 U.S. 363, 17 L.Ed.2d 420, 87 S.Ct. 468, at 385 U.S. 368, 17 L.Ed.2d 425 [court bailiff assigned to sheperd sequestered jury makes statements to jurors

urging conviction which are found by trial court to be prejudicial].)

As this Court has pointed out, Turner v. Louisiana [1964] 379 U.S. 466, 85 S.Ct. 546, 13 L.Ed.2d 424, ". . . did not set down a rigid, per se rule automatically requiring the reversal of any conviction whenever any Governmental witness comes into any contact with the jury" (Gonzales v. Beto [1972] 405 U.S. 1052, 1054; 31 L.Ed.2d 787; 92 S.Ct. 1503, 1504-1505). Here, unlike Turner (where the jury custodians also served as vital prosecution witnesses in the same case) there is no indication that any outside information which certain jurors received on their own either directly pertained to the case at bar or necessarily favored the prosecution (other than merely opposing obscenity, the illegality of which is presupposed in the trial proceeding itself).

C

A SEARCH WARRANT FOR THE SEIZURE OF ALLEGEDLY OBSCENE FILM MAY BE EXECUTED ON THE BASIS OF A PREVIOUS EX PARTE JUDICIAL DETERMINATION WHERE STATE LAW (1) REQUIRES THE PROSECUTION TO FIRST SHOW PROBABLE CAUSE THAT PRESUMPTIVELY PROTECTED FILMS ARE OBSCENE BY AN AFFIDAVIT WHICH FOCUSES SEARCHINGLY ON THE QUESTION OF OBSCENITY AND (2) PROVIDES THE OWNER WITH, INTER ALIA, A MOTION FOR A PROMPT PRE-TRIAL ADVERSARY PROCEEDING TO REVIEW SUCH DETERMINATION

1.) Petitioner contends that California provision of "a full hearing on the question of the lack of probable cause for the issuance of a seizure warrant for reasons of free speech violations" (Monica Theater v. Municipal Court [1970] 9 Cal. App.3d 1, 9) somehow falls short of the constitutional requirement, following seizure, of "a prompt judicial determination of the obscenity issue in an adversary proceeding...available at the request of any interested party." (Heller v. New York [1973] 413 U.S. 482, 93 S.Ct. 2789, 2795.)

Petitioner thus confuses a standard of proof ("probable cause") with an issue to be

determined ("obscenity").

In Heller, this Court carefully distinguished judicial procedures requisite to imposition of a "final restraint" upon films (e.g. injunctions against exhibition, seizures to destroy them or block their exhibition) from procedures requisite to the seizure of "a single copy of a film for the bona fide purpose of preserving it as evidence in a criminal proceeding, particularly where... there is no showing or pretrial claim that the seizure of the copy prevented continuing exhibition of the film." (Id. at 413 U.S. 490, 492; 93 S.Ct. 2793, 2794-2795.) While the former situation raises the First Amendment specter of "prior restraint", the latter seems to presuppose no prior restraint and thus reduces essentially (at this point) to a Fourth Amendment issue.

Thus, a prior judicial (albeit ex parte) determination of probable cause (the search warrant requirement) "will protect against gross abuses", while "the availability of a prompt judicial determination in an adversary proceeding following the seizure assures that difficult marginal cases will be fully considered in light of First Amendment guarantees, with only a minimal interference with public circulation

pending litigation." (Id. at 413 U.S. 493, 93 S.Ct. 2795 [emphasis added].) It is, of course, the adversary feature which assures full consideration of difficult marginal cases--not the standard of proof. As a California intermediate appellate court points out, "[w]e have no concern here with the final determination as to the obscene nature of the films; even a prior adversary hearing before the issuing magistrate [which Heller found unnecessary] establishes no more than probable cause and does not establish obscenity itself or there would be no need for a trial." (People v. Sarnblad [1972] 26 Cal.App.3d 801, 807.)

In addition to (1) "an ex parte determination of the issue of obscenity, so far as probable cause is concerned... before issuance of the warrant," and (2) "immediately after the seizure a determination of the issue to that extent...in adversary proceedings by controverting the warrant under sections 1539 and 1540 of the Penal Code" (Aday v. Superior Court [1961] 55 Cal.2d 789, 799), California also provides (3) "by means of a section 1538.5 motion, a very prompt adversary judicial proceeding" (Monica Theater, supra at 9 Cal.App.3d 14), (4) "a nonstatutory

motion for release of property seized under a search warrant" (Loar, supra at 28 Cal. App.3d 609; see Buker v. Superior Court [1972] 25 Cal.App.3d 1085, 1089), and (5) "a pretrial on-the-merits consideration of the character of the involved material (obscene or not obscene)" on defense motion. (Monica Theater, supra at 9, n. 7; see Zeitlin v. Arnebergh [1963] 59 Cal.2d 901, 904, 908-911 [declaratory relief]; People v. Noroff [1967] 67 Cal.2d 791, 793; Aday v. Municipal Court [1962] 210 Cal.App.2d 229, 244.)

Furthermore, (6) "the state must initiate proceedings leading to a final judicial determination on the question whether the materials are protected within a reasonable period compatible with sound judicial administration" with "the burden of [proof] ...borne by the state." (Loar, supra at 28 Cal.App.3d 620.) Otherwise, (7) "other remedies such as mandamus will be available to secure return of the property." (Aday v. Superior Court, supra at 55 Cal. 789, 799.)

2.) Petitioner contends that California law does not (as to search and seizure) place the burden of establishing obscenity on the prosecution. Not so. Under

California law "[a] search warrant cannot be issued but upon probable cause, supported by affidavit." (California Penal Code section 1525.)

The term "probable cause" refers to a standard of proof (not an issue to be determined such as obscenity, exhibition, etc.). "Probable cause" is approximately the same as "preponderance of the evidence" (see People v. Ingle [1960] 53 Cal.2d 407, 413), the standard that would prevail in a civil case as for an injunction.

In addition, California law recognizes that purported obscenity is "presumptively" protected by the First Amendment (People v. Superior Court [Loar] [1972] 28 Cal.App.3d 600, 615 [emphasis added]) and, until judicially determined otherwise, "cannot be treated in the same manner as contraband... for purposes of search and seizure." (Flack v. Municipal Court [1967] 66 Cal.2d 981, 989-990, 990.) This requires "a judicial determination that there is probable cause to believe the material falls outside the constitutional protection." (People v. Superior Court [Freeman] [1975]

14 Cal.3d 82, 90.)[3/] The California Supreme Court further recognizes that "...the requirement of probable cause is especially important where...freedom of speech and press is involved, and great caution must be exercised before permitting the seizure of books on the ground of obscenity." (Aday v. Superior Court [1961] 55 Cal.2d 789, 797.) Thus, under California decisional law "affidavits submitted to the magistrate in support of a request for a seizure warrant can be [i.e., in order to meet constitutional requirements] composed in a manner to

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3. This refers to probable cause to believe the materials obscene under California law, i.e., the standard tripartite test (Monica Theater v. Municipal Court [1970] 9 Cal.App.3d 1, 8-9, n. 6) "limited to the patently offensive representations or descriptions of the specific 'hard-core' sexual conduct given as examples in Miller I. [Miller v. California (1973) 413 U.S. 15, 37 L.Ed.2d 419, 93 S.Ct. 2607], i.e., 'ultimate sexual acts, normal or perverted, actual or simulated,' and 'masturbation, excretory functions, and lewd exhibitions of the genitals' (413 U.S. at p. 25 [37 L.Ed.2d at p. 431].)" (Bloom v. Municipal Court [1976] 16 Cal.3d 71, 81.) The California obscenity statute as authoritatively construed was specifically upheld in Hicks v. Miranda (1975) 422 U.S. 332, 45 L.Ed.2d 223, 95 S.Ct. 2281, and Miller v. California (II) (1974) 418 U.S. 915, 41 L.Ed.2d 1158, 94 S.Ct. 3206.)

focus searchingly on the question of obscenity." (Monica Theater v. Municipal Court [1970] 9 Cal.App.3d 1, 16.) Therefore, the existence of the warrant indicates that the People had already successfully satisfied their burden in procuring its issuance.

Although, after the warrant has issued the defendant-owner becomes the moving party in seeking to suppress the evidence or its return (id. at 9), "[t]he burden is upon him to make a prima facie case that the material is not obscene and hence not subject to seizure [citation omitted]. Once he has done so, the burden shifts to the state to establish that the material is in fact obscene." (People v. Bonanza Printing Co. [1969] 271 Cal.App.2d Supp. 871, 874.) The People's burden on a Penal Code section 1538.5 motion is a preponderance of the evidence. (People v. Stafford [1972] 28 Cal.App.3d 405, 412; citing People v. Superior Court [Bowman] [1971] 18 Cal.App.3d 316, 321.)

Contrary to petitioner, Heller v. New York (1973) 413 U.S. 483, 37 L.Ed.2d 745, 93 S.Ct. 2789, does not require that the People bear the burden of proof at the post-seizure adversary hearing. (Id.

at 93 S.Ct. 2794-2795.)

3.) "The setting of the bookstore or the commercial theater [is] each presumptively under the protection of the First Amendment warrant requirements" (Roaden v. Kentucky [1973] 413 U.S. 496, 504-505, 37 L.Ed.2d 757, 764-765, 93 S.Ct. 2796.) However, a setting such as a licensed bar or nightclub (as here) invokes that state regulatory interests protected by the Twenty-first Amendment, no less part of the federal Constitution, wherein the state regulatory authority is not "limited to either dealing with the problem it confronted within the limits of our decisions as to obscenity, or in accordance with the limits prescribed for dealing with some forms of communicative conduct in O'Brien, supra," (California v. La Rue [1972] 409 U.S. 109, 116, 34 L.Ed.2d 342, 351, 93 S.Ct. 390.) The setting herein is of the latter description.

CONCLUSION

For the reasons stated above, the Petition should be denied.

Respectfully submitted,

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MODIFIED COPY OF CALJIC 16.186

OBSCENITY -- "CONTEMPORARY COMMUNITY STANDARDS" -- DEFINED

Requested by People		Given as Requested	✓	Refused	
Requested by Defendant		Given as Modified		Withdrawn	
		Given on Court's own Motion			

Judge

16.186

The contemporary community standard referred to in these instructions is set by what is, in fact, acceptable to the community as a whole, not by what some person or persons may believe the community as a whole ought to accept. Ascertainment of the standard must be based upon an objective determination of what affronts, and is unacceptable to, the community as a whole. Your own personal, social or moral views on material such as that charged in the complaint may not be considered.

For the purposes of determining the obscenity of the material here in question the controlling community is the entire State of California.